FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 8 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 693. 252.

THE STATE OF MONTANA EX REL. CHARLES S. HAIRE, PLAINTIFF IN ERROR,

vs.

JAMES H. RICE, AS STATE TREASURER, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFF IN ERROR.

M. S. GUNN,
Attorney for Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24633

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 693.

THE STATE OF MONTANA EX REL. CHARLES S. HAIRE, PLAINTIFF IN ERROR,

vs.

JAMES H. RICE, AS STATE TREASURER, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFF IN ERROR.

It is contended for defendant in error that no federal question is involved in this case, by reason of which this court is without jurisdiction to review the judgment of the Supreme Court of the State of Montana.

Federal Questions.

Section 3 of Article IV of the Constitution of the United States provides:

> "The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States."

By virtue of this provision of the Constitution of the United States, Congress had the power to make the grant con-

tained in section 17 of the Enabling Act, and to provide therein that "the lands granted by this section shall be held, appropriated and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective States may severally provide."

Gibson *vs.* Choteau, 13 Wall., 92.
Butte City Water Co. *vs.* Becker, 196 U. S., 119.
Irvin *vs.* Marshall, 20 Howard, 538.

In the opinion in the case of Missouri, etc., Ry. Co. *vs.* Railway Co., 97 U. S., 491, it is said:

> "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress."

The Grant Regarded as a Law.

Section 17 of the Enabling Act contains a grant to the State of Montana for the purpose of *establishing* as well as maintaining a State normal school, and conferred authority upon the Legislative Assembly of Montana to pass the act approved February 2, 1905. In holding this act invalid, the Supreme Court of the State decided against the validity of the authority which it is claimed for plaintiff in error was conferred upon the Legislative Assembly of Montana by said section 17.

Again, it is claimed for plaintiff in error that section 12 of Article XI of the State Constitution, as construed by the Supreme Court of the State, is in conflict with section 17 of the Enabling Act, and is invalid. The decision of the Supreme Court of the State was in favor of the validity of this provision of the State Constitution.

The Grant Regarded as a Contract.

It is further claimed for plaintiff in error that the grant contained in section 17, when accepted by the constitutional convention of Montana, resulted in a contract, and that section 12 of Article XI of the Constitution of the State, as construed by the Supreme Court of Montana, violates the obligation of such contract.

The authorities sustaining the proposition that a contract was created by the acceptance of the grant are cited on pages 36, 37, and 38 of the brief for plaintiff in error heretofore filed.

The contract was complete when the grant was accepted by the Constitutional Convention. The Constitution did not go into effect until the admission of Montana into the Union. The adoption of the Constitution and the admission of Montana into the Union were in the nature of conditions subsequent.

If, however, it should be held that the acceptance of the grant by the Constitutional Convention was inoperative until the Constitution went into effect, and that the seventh section of said Ordinance No. 1 should be construed in connection with the Constitution, then the construction of section 12 of Article XI of the State Constitution by the Supreme Court of the State is not controlling in this court.

When a right is asserted by virtue of an alleged contract with the United States, this court will for itself determine the existence and the terms and conditions of the contract. It follows that if the existence and the terms and conditions of the contract in question are to be determined by a consideration of section 12 of Article XI of the State Constitution, as well as the seventh section of the Ordinance adopted by the Constitutional Convention accepting the grants made to Montana by the Enabling Act, this court should construe said section of the Constitution of Montana, and the construction placed thereon by the Supreme Court of the State is not controlling.

Construction of Section 12 of Article XI of the State Constitution.

Section 12 of Article XI of the Constitution of the State provides:

> "The funds of the State university and of all other State institutions of learning, from whatever source accruing, shall forever remain inviolate and sacred to the purpose for which they were dedicated. The various funds shall be respectively invested under such regulations as may be prescribed by law, and shall be guaranteed by the State against loss or diversion. The interest of said invested funds, together with the rents from leased lands or properties, shall be devoted to the maintenance and perpetuation of these respective institutions."

The preamble to the Constitution of Montana reads as follows:

> "We, the people of Montana, grateful to Almighty God for the blessings of liberty, in order to secure the advantages of a State government, do, in accordance with the provisions of the enabling act of Congress, approved the 22nd of February, A. D. 1889, ordain and establish this Constitution."

Section 1 of Article XVII of the Constitution provides:

> "All lands of the State that have been, or that may hereafter be granted to the State by Congress, and all lands acquired by gift or grant or device, from any person or corporation, shall be public lands of the State, and shall be held in trust for the people, to be disposed of as hereafter provided, for the respective purposes for which they have been or may be granted, donated or devised."

When the preamble to the Constitution and section 1 of Article XVII are considered in connection with the seventh

section of Ordinance Number 1, accepting the grants made by the Enabling Act "upon the terms and conditions therein provided," it is quite apparent that the framers of the Constitution did not intend by section 12 of Article XI to require a departure from the purposes of the said grants.

Section 17 of the Enabling Act does not provide for the creation of or dedicate any fund, but it provides that the lands shall be appropriated to the purposes for which they are granted. On the other hand, section 14 provides for the creation of a "permanent fund" for the State university, by the sale of the lands granted by that section, and section 16, when taken in connection with the act of 1862, therein referred to, provides for the creation of a "perpetual fund" for an agricultural college, by the sale of the lands granted by that section. "Funds" may be created for the other institutions of learning by grants of land or donations of other property or money by private individuals, the State, or Congress.

If a person should make a gift of $100,000 to the State, to be used for the purpose of erecting an addition to the State Normal School building, this gift would not constitute a fund subject to the provisions of said section 12 of Article XI of the Constitution. If the State should make an appropriation of money for the establishment of a State normal school, the money thus appropriated would not constitute a fund to be invested as required by the provision of said section of the Constitution.

The grant of lands by Congress for the establishment of a State normal school, stands on the same basis as the gift by an individual or an appropriation by the State for a like purpose. If all moneys received for the institutions of learning, mentioned in this section of the Constitution, are subject to the provisions of said section, as the Supreme Court of the State holds, such institutions never could be legally established.

Right of Plaintiff in Error to Raise Questions Presented.

It is argued for defendant in error that if section 17 is held to contain a grant to the State of Montana for the purpose of establishing as well as maintaining a State normal school, the failure of the State to apply the grant to the establishment of such a school is a matter which concerns Congress alone. This argument assumes that the Legislative Assembly of the State has failed to appropriate the lands to the establishment of a State normal school, whereas the Legislative Assembly, by the act approved February 2, 1905, has strictly observed the purpose of the grant and exercised the authority conferred upon it by said section 17. If the Legislative Assembly of the State had provided that the proceeds received from the sale or leasing of the lands granted should be used for no other purpose than to maintain and perpetuate a normal school, then plaintiff in error would undoubtedly have no right to complain, and the authorities cited for defendant in error on page 2 of his brief would be in point. This is not a case in which the State has violated the trust imposed upon it by Congress, but, on the contrary, the Legislative Assembly of the State has strictly observed the trust imposed by section 17 of the Enabling Act.

It is contended for defendant in error that plaintiff in error has no interest which entitles him to question the impairment of the obligation of the contract created by the acceptance of the grant, or to call in question the terms and conditions of the contract.

The plaintiff in error, by virtue of the claim he holds, which is justly payable out of the proceeds received from the sale of the bonds in question, has an interest in the contract. The lands are pledged for the payment of the bonds, and the proceeds from the sale of the bonds are applicable to the payment of the claim of the plaintiff in error.

Respectfully submitted,

M. S. GUNN,
Attorney for Plaintiff in Error.